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No. 03-531

Supreme Court, U.S.
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In The

Supreme Court of the United States

YARDARM RESTAURANT, INC.,

Petitioner,

v.

THE CITY OF POMPANO BEACH,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fourth District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

If Yardarm's Petition for Writ of Certiorari is as legally deficient as asserted by the City of Pompano Beach and its Amicus, the Broward County League of Cities, one wonders why they needed 37 pages of argument and citation of 88 cases to so demonstrate.

The blunt fact is that the treatment it meted out to Yardarm was so outrageous that the City is not able to defend it. Instead, it seeks to gloss over the facts and becloud the issues with inapposite case law.

The core of this case is that a constitutional outrage was committed by the City, and the Florida courts gave it their blessing. This Court's intervention is amply warranted to return Florida to the constitutional fold and to clarify the 5th Amendment protection of land owners against takings and due process violations.

I. FLORIDA WILL NOT APPLY THIS COURT'S DISJUNCTIVE TEST FOR A REGULATORY TAKING. CERTIORARI IS NECESSARY TO PROTECT FLORIDA LAND OWNERS.

The City asserts there is an "independent" state ground for the decision that cannot be reached by this Court, i.e., the statute of limitations barred the action.

The City is wrong, both on its own premise (see *post*, pp. 4-5) and because its argument addresses the wrong constitutional injury. The City pretends that the taking was only temporary and ended in 1981 when, in

fact, a permanent taking occurred in 1986, thus starting a new limitations period for the latter taking.

This is this Court's first opportunity to review Yardarm's case as a matter of *federal* constitutional law. *Yardarm I* (App., p. 22) decided only that the City prevailed as a matter of *state* constitutional law. (App., p. 37.)[1] But Florida's takings law deliberately refuses to employ this Court's disjunctive test for a taking under *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), i.e., that a taking occurs if local government action *either* fails to substantially advance a legitimate state interest *or* deprives the land owner of economically viable use of property. Florida denies the first alternative in that formula, employing only the second.[2]

In noteworthy contrast to Florida, the Ohio Supreme Court recently re-examined its position (which *had been* the same as Florida's) and conceded its error by holding that "[s]atisfaction of either prong of the *Agins* test establishes a taking." (*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 351 [Ohio 2002].)

This Court now has the opportunity to examine *ab initio* whether the takings test it articulated in *Agins* means

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1 Although (out of an abundance of caution) Yardarm petitioned for Certiorari in *Yardarm I*, it was unsurprisingly denied [515 U.S. 1144] because — being from a decision of *state* law — it could not present any *federal* issue for review.

2 See, in addition to the opinion below (App., p. 38), *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994); *Department of Transp. v. Weisenfeld*, 617 So.2d 1071, 1073-1074 (Fla. App. 1993). The City confirms this by denigrating *Agins* as providing only a "purported" test. (Br. in Opp., p. 7, fn. 6.)

what it says, and whether the facts below establish a takings claim as a matter of *federal* law, which is binding on Florida officials under the Supremacy Clause.

First, when *Yardarm I* remanded the case for trial of the due process claims (App., p. 47) it must have intended that a trial on the merits ensue. Otherwise its opinion would make no sense.

Second, the trial court then properly addressed the *federal* takings claim, which became ripe only after the state takings claim was concluded in *Yardarm I*. (See *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 194-195 [1985].)

Third, the decision below could not be an adequate and independent state ground because the Florida appellate courts truncated the *Agins* rule in *Yardarm I* and then abused that holding with respect to a *temporary* taking under *state* law to reverse (in *Yardarm II*) the judgment that a *permanent federal* taking had occurred. The constitutionality of that action presents a federal question. (See *Henry v. Mississippi*, 379 U.S. 443, 447 [1965].)

Fourth, the second trial considered facts not available in *Yardarm I*. (App., pp. 50-51.) They showed that the City's concerted actions continued through 1986, when Yardarm lost the property through foreclosure, thus making the taking permanent then. (App., pp. 61-68.) As the trial court found, that resulted directly from the City's continuous course of conduct toward Yardarm. (App., pp. 57, 112.) Whatever Florida holds, continuous wrongdoing extends the statute of limitations *as a matter of federal law*. (E.g., *Brenner v. Local 514*, 927 F.2d 1283, 1295 [3d Cir. 1991]; *Boling v. U.S.*, 220 F.3d 1365, 1371 [Fed. Cir. 2000].)

Finally, the most that *Yardarm I* could have held time-barred was a claim for a *temporary* taking that ended

in 1980. (See App., pp. 45-46.) But the subject of *Yardarm II* was a new, *permanent* taking. The property had been lost due to the City's actions, and the City had bought it out of foreclosure from the lender. That is when Yardarm's damages fully accrued and stabilized, and that is when the federal limitations period began. (*U.S. v. Dickinson*, 331 U.S. 745, 749 [1947].) The difference in applying the statute of limitations to temporary, as opposed to permanent, takings was explained recently by the Court of Appeals for the Federal Circuit, the court that hears all takings appeals against the federal government:

> "In other words, stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a *permanent* taking . . . . Thus, during the time when it is uncertain whether the gradual process will result in a *permanent* taking, the *plaintiff need not sue*, but once it is clear that the process has resulted in a *permanent* taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run." (*Boling*, 220 F.3d at 1371; emphasis added.)

The validity and timeliness of the *federal permanent* takings claim as a matter of *federal* law was not addressed in *Yardarm I* because that claim did not yet exist. The trial court examined it in *Yardarm II*. State practice, as this Court held through Justice Holmes, cannot stand in the way of the federal Constitution: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and

reasonably made, is not to be defeated under the name of local practice." (*Davis v. Wechsler*, 263 U.S. 22, 24 [1923].)

II. A STATE COURT MAY NOT INTERPRET STATE LAW TO PROVIDE *LESS* PROTECTION TO INDIVIDUALS THAN THE U.S. CONSTITUTION.

The City's argument that *Yardarm I* rested on Florida law (Br. in Opp., pp. 7-8), proves too much. It assumes that Florida may interpret its constitution in a way that *denies* citizens the full 5th Amendment protection mandated by this Court. That has never been the law.

As this Court firmly held in *Sibron v. New York*, 392 U.S. 40, 60-61 (1968):

> "New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, [citation] and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.' "

Thus, while allowing states substantial freedom to adopt and enforce their own constitutions and statutes, this Court has made it clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all

are entitled. The freedom which states enjoy, in takings cases like any others, is to provide *more* protection than that, not less. (*Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 [1932].)

III. THIS IS NO "MERE DELAY" CASE. RATHER, IT IS BASED ON A COURSE OF WILLFUL GOVERNMENTAL MISCONDUCT OF A KIND THAT IS (THANKFULLY) ONLY SELDOM SEEN, BUT THAT MUST BE REMEDIED WHEN IT APPEARS.

The City seeks to sweep this case under a rug by labeling it one of "mere delay" in obtaining permits. (E.g., Br. in Opp., p. 13.) That only shows how fervently the City tries to evade the actual facts, which were extensively discussed in the Petition (Pet., pp. 5-8, 18-19), and need not be repeated here.

Suffice it to say that if delay were all that was involved below, no suit would have been filed. This case, however, involves years of underhanded, illegal, secretive, and conspiratorial conduct by the highest officials of the City. Their goal — as two trial judges found on ample evidence that was largely undisputed by the City and not questioned by the Court of Appeal — was to prevent Yardarm from developing a perfectly legal hotel and marina on land that the City itself had planned and zoned for just such use. The City defied repeated state court judgments and forced Yardarm to sue repeatedly in state court solely to compel it to comply with crystal-clear law.

Yardarm believes that such blatant and extensive misconduct is not the routine way that American cities go about their governance. However, when cities like

Pompano Beach turn rogue, the law must provide some remedy.[3] This Court put it both bluntly and clearly when it concluded that "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." (*U.S. v. Cors*, 337 U.S. 325, 332 [1949].)

Florida's appellate courts have stripped that state's law of any remedy for egregious municipal misconduct. This Court's aid is needed not only to interdict Florida's lawlessness, but to make clear to other jurisdictions that such conduct is beyond the constitutional pale.

IV. YARDARM HAS NEITHER ASKED THIS COURT TO EXPAND THE CONCEPT OF SUBSTANTIVE DUE PROCESS NOR TO CREATE SOME NEW CAUSE OF ACTION. RATHER, YARDARM HAS ASKED THIS COURT TO *APPLY EXISTING* SUBSTANTIVE DUE PROCESS CONCEPTS TO CASES OF OUTRAGEOUS GOVERNMENT CONDUCT — LIKE THIS ONE.

The City and its amicus have mischaracterized the Petition, claiming either that Yardarm seeks some radical expansion of substantive due process (Br. in Opp., p. 26)

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[3] As this Court has noted repeatedly in recent years, in those rare cases involving bad faith on the part of government, constitutional liability should follow. (See *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 333 [2002]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 [1999]; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 [2000].)

or the creation of an entirely new (and heretofore unknown) cause of action (League of Cities, p. 6).

Both are wrong. Yardarm merely pointed out the obvious, i.e., that the current Florida rules of regulatory takings requiring total economic destruction of private property before liability attaches leave grievously damaged property owners without any takings remedy. Concomitantly, the lower courts' invocation of stringent rules for applying substantive due process to cases involving land use have rendered that avenue of relief likewise illusory.

All Yardarm asked of the Court was that it examine this unwarranted jurisprudential gap whereby citizens subjected to arbitrary, vicious municipal misconduct are said to have no redress at all in the Southeastern United States unless the harm inflicted on them is so severe as to leave them with nothing.

There are two forms of potential 5th Amendment relief — for takings and denial of due process. This Court's jurisprudence allows people like the Stephanis brothers in this case to have a realistic chance at obtaining constitutional relief. The Florida appellate courts have made that virtually impossible. That result is so at odds with this Court's holdings that intervention is necessary to re-align Florida law with this Court's standards requiring civilized behavior on the part of municipal functionaries. There's nothing revolutionary in asking that.

CONCLUSION

The City's Brief in Opposition is exemplary for its obfuscatory argument. It refuses to deal with the focal points of this Petition. *First*, the City's highest officials conspired to violate the City's own laws, as well as the

Constitution, in order to prevent Yardarm from developing a hotel on property the City had planned and zoned precisely for that use.[4] *Second*, there was little dispute in the evidence. The City simply took the position that the outrageous actions of its governing officials were perfectly acceptable. But they are not acceptable in a constitutional society like ours, and trial judges kept telling the City so. The problem is that Florida's appellate judiciary has written Florida law so that it undercuts the protection that this Court has carefully laid out for property owners under the 5th Amendment. *Third*, the law in Florida fails constitutional examination.

The issues in this case, as demonstrated by the amicus briefs filed in support of both sides, go far beyond Yardarm and Pompano Beach.[5] This case presents the Court with the opportunity to set some clear ground rules and (perhaps) eliminate some of the contentiousness from land use disputes. When people — on all sides of the issue

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[4] The eventual impact of that was a permanent taking when Yardarm lost its property — all of it — and the City acquired it at a bargain price from the foreclosing lender. Takings are measured by the impact on the owner. (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910]; *U.S. v. General Motors*, 323 U.S. 373, 378 [1945].) That permanent taking is what this case is about.

[5] In this connection, we particularly commend to the Court's attention the straightforward brief filed in support of Yardarm by Dale Ledbetter. Mr. Ledbetter is simply a resident of Broward County, Florida, who has followed the news coverage of this case over the years and was so outraged by what the City had perpetrated that he filed his own brief urging this Court to intervene .

— know what the rules are, they can generally adapt. When, however, they know only that the rules are made up *ad hoc* for each case, litigation perpetuates.

Yardarm prays that certiorari be granted to bring some rationality to this field of law, and a measure of justice to the Stephanis brothers.

Respectfully submitted,

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